FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976.

VILLAGE OF ARLINGTON HEIGHTS, ET AL.,
Petitioners,

vs.

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, ET AL.,
Respondents,

NORTHWEST OPPORTUNITY CENTER and ELUTERIA D. MALDONADO,
Intervening Respondents.

RESPONDENTS' REPLY TO PETITIONERS' SUPPLEMENTAL BRIEF

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Introduction

In its supplemental brief, Arlington Heights all but calls for repeal of the Supremacy Clause in exclusionary zoning matters based on its "analysis" of three cases re-

cently decided by this Court (*Hills* v. *Gautreaux,* ..... U.S. ....., 47 L.Ed.2d 792 (1976); *Washington* v. *Davis,* ..... U.S. ....., 48 L.Ed.2d 597 (1976); and *Eastlake* v. *Forest City Enterprises, Inc.,* ..... U.S. ....., 49 L.Ed.2d 132 (1976)). While important differences of opinion characterized the Court's rulings in each of these cases, the results reached are not challenged here. What respondents do vigorously dispute, however, is the suggestion that any of these decisions sanctions the efforts of a virtually all-white community to perpetuate the massive residential segregation of its growing area by blocking construction of 190 attractively designed townhouses of two stories or less by a private, non-profit developer that "might well result in increasing Arlington Heights' minority population by over one thousand percent." 517 F.2d 409, 414.

I.

WASHINGTON v. DAVIS: EQUAL PROTECTION

Washington v. *Davis, supra,* involved an equal protection challenge to a qualifying examination for prospective police officers based solely on the test's discriminatory impact in screening out black applicants. No claim of "intentional discrimination or purposeful discriminatory actions" was made. 48 L.Ed.2d 597, 604. In sustaining the validity of the test, the Court rejected the proposition that its disproportionate racial impact "standing alone and without regard to discriminatory purpose" would trigger the rule that official acts are subject to the strictest judicial scrutiny under the Equal Protection Clause when racial classifications are involved. *Id.,* at 609-610.

In the instant case the Court of Appeals held that "racial disparity alone as it relates to the housing project under

consideration does not amount to racial discrimination." 517 F.2d 409, 416. Thus the *Washington* injunction against an equal protection claim solely on the disproportionate impact of the challenged action is not violated.

The Court's opinion in *Washington* recognized that the necessary discriminatory purpose need not be express nor appear on the face of the statute and that a law's disproportionate impact is certainly a relevant factor, if not *the* relevant factor, in proving Constitution-based claims of racial discrimination. *Id.,* at 608. Indeed, since an official who intends to discriminate would rarely admit his real motive, the required invidious purpose generally would, of necessity, have to be "inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.,* at 608-609.

Nevertheless, the disproportionate impact of the police test in *Washington* did not "warrant the conclusion that it was a purposeful device to discriminate against Negroes," the Court held, because any inference that the Metropolitan Police Department purposefully discriminated on the basis of race was negated by the Department's evidence of its affirmative efforts to recruit black officers, of the changing racial composition of the recruit classes and of the force in general (44% of which were black), and of the proven relationship of the test to the police training program. *Id.,* at 611.

The Court of Appeals' decision here is consistent with both the reasoning and the result of *Washington* v. *Davis.**

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* Petitioners misread the Court's opinion in *Washington* when they contend that inclusion of the decision below in its footnote 12 means that that decision has been "specifically disapproved." The Court carefully limited its disagreement with the "footnote 12

(Footnote continued)

The court began its analysis of petitioners' exclusion of Lincoln Green with the fact that their action would have a disproportionate impact on minority persons, but it specifically held that this fact *alone* did not establish an equal protection violation. 517 F.2d 409, 413. As the *Washington* opinion was to point out, the importance of this disproportionate impact in establishing a Constitution-based claim of racial discrimination could only be assessed against "the totality of the relevant facts" (48 L.Ed.2d 597, 608). The Court of Appeals went on to make such assessment by reviewing the context in which the decision to block the MHDC development had been made.

Among the totality of relevant facts that the record established were: (1) Arlington Heights had used its zoning and other powers to expand from a small village to one with a 1970 population of nearly 65,000 people, 99.9% of whom were white, making Arlington Heights the most residentially segregated large municipality in the greater

(Footnote continued)
decisions" only *"to the extent* that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." *Id.*, at 610-611 (emphasis supplied). The record on which the Court of Appeals based its decision here contains substantial proof of Arlington Heights' discriminatory racial purpose in blocking Lincoln Green (discussed *infra*), despite the fact that the District Court, at petitioners' insistence, excluded evidence concerning their state of mind and motivation (see "Decision on Plaintiffs' Discovery Motion" (July 10, 1973) in the Court of Appeals Appendix (87-88); Tr. 161-163). The judgment of the Court of Appeals was, therefore, neither "disapproved" nor does it conflict with the *Washington* opinion.

Chicago area (516 F.2d 409, 413-414);* (2) Arlington Heights' spectacular *and highly segregated growth* patterns had been reflected in similarly dramatic statistics for the surrounding four-township area, which from 1960 to 1970 had also taken some 100,000 jobs from the City of Chicago (517 F.2d at 414); (3) Arlington Heights had continuously refused to permit, let alone support or encourage, any low and moderate income housing within its expanding borders, even though it had officially recognized the desperate and growing need for such housing that the massive population and job shifts had created (517 F.2d at 411, 414, 415; App. I 68); (4) Arlington Heights' refusal to permit construction of Lincoln Green meant that it was blocking the only opportunity to have any subsidized, integrated housing and thereby significantly to reduce residential segregation there (517 F.2d at 414, 415); and (5) Arlington Heights' rejection of Lincoln Green was with-

* It is statistically virtually impossible that these residential patterns could have developed in the Chicago area without purposeful racial discrimination. The record establishes that had Arlington Heights been an open community where the housing market was color-blind and was governed only by random choice, the number of blacks there now would be over 3,200, not 27 (Ps. Ex. 50 [50 WR-9]; Tr. 583). Nor should Arlington Heights be allowed to disclaim responsibility for the results of this discrimination, as the Court of Appeals noted when it held that Arlington Heights had exploited the problem of segregation in its area and never made any attempt to alleviate it. The dispute over Lincoln Green vividly demonstrates that the Arlington Heights officials know in advance whether a proposed development is to be integrated and can and do use their zoning powers to reject proposals simply on the basis of community racial hostility (see Ps. Ex. 42, p. 6).

out substantial justification (517 F.2d at 415.)* Since Arlington Heights' decision to block Lincoln Green was thus clearly established as an effort to perpetuate, encourage, and continue to exploit racial segregation and since that action was not adequately explained on nonracial grounds (see *Washington* v. *Davis,* 48 L.Ed.2d 597, 608-609), the Court of Appeals properly held that it involved the kind of invidious racial discrimination condemned by the Equal Protection Clause.**

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* All of the professional evidence presented to petitioners during zoning hearings before the Plan Commission and the Trustees supported the propriety of the Lincoln Green townhouses at the Viatorian location. In contrast, petitioners never received or even asked for the opinion of their own professional planner on the development. (App. I 68; Tr. 114-115). Rather, as the Village President stated, they rejected the MHDC proposal in response to the unprecedented community opposition that it provoked (Ps. Ex. 42, p. 6), which was based in substantial part on the race of the proposed residents (see Respondents' Brief 16-19). At trial, petitioners came up with two zoning claims to rationalize their decision: (1) the "integrity" of their buffer policy regarding multiple family developments, which had not been applied with any consistency in the past and which "has only minimum applicability to this type of low-rise, open space development" (517 F.2d at 415); and (2) neighbors' fears that the value of their homes might be diminished by their proximity to an integrated, subsidized development. The Court of Appeals' analysis and rejection of these insubstantial defenses was correct, regardless of what standard of judicial scrutiny might be appropriate.

**As Mr. Justice Harlan wrote in commenting on the Equal Protection Clause in *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 150-152 (1970): "Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation."

Even though this court's opinion in *Washington* makes clear that direct proof of official racial motivation is not required, respondents have nevertheless always contended that petitioners' decision was indeed racially motivated (see 373 F. Supp. 208, 210; compare *Washington* v. *Davis,* 48 L. Ed.2d 597, 604), and the record amply supports this contention (see Respondents' Brief 16-19; 24-25). There is, indeed, no small irony in the claim in petitioners' supplemental brief that "[n]o racial motive was proven" (p. 5), because it was petitioners, themselves, who successfully urged the district court [on the strength of *Palmer* v. *Thompson,* 403 U.S. 217 (1971) and *U.S.* v. *O'Brien,* 391 U.S. 367 (1968)] to prohibit any inquiry into their state of mind or motivation when they rejected Lincoln Green.*

Nevertheless, the circumstantial evidence of petitioners' illicit motivation is substantial. For example, petitioners' review of Lincoln Green was clearly not directed toward the merits of the proposal because all of the professional evidence that was produced favored it, all of the suggestions of the Arlington Heights' staff and Plan Commission were incorporated into the Lincoln Green plans, and petitioners never received nor even asked for the professional opinion of their own zoning and planning expert regarding the proposal (App. I 68; Tr. 114-115). What petitioners *did* respond to was the overwhelming, hostile, unprecedented reaction of the community against Lincoln Green, which often involved racially explicit statements and which, the

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* See the District Court's "Decision on Plaintiffs' Discovery Motions" (July 10, 1973) in the Court of Appeals Appendix (87-88); Tr. 161-163. It is perhaps not insignificant that petitioners fought so hard to keep this evidence out of the record, and respondents argued such evidence is a proper subject for inquiry and is admissible.

Village President stated, was "a mandate to reject this proposal." (See Respondents' Brief 17-19; Ps. Ex. 42, p. 6).*

The contrast with the petitioners' behavior in *Washington* v. *Davis* is striking. While 44% of the new police officers recruited by the *Washington* petitioners in recent years were black (the same percentages as 20 to 29 year old blacks in the recruiting area), the spectacular growth of Arlington Heights has been limited to whites, even though the number and percentage of blacks in the overall Chicago area have risen substantially during the period 1960 to 1970 (Tr. 554-555). While the *Washington* petitioners "systematically and affirmatively sought to enroll black officers" (48 L.Ed.2d 597, 605), Arlington Heights has refused to accept any responsibility for dealing with its totally segregated housing patterns and indeed has even blocked all private efforts, such as MHDC's, to alleviate this problem. And while the *Washington* defendants estab-

* Neither of the courts below dealt directly with this evidence. The District Court, having ruled during discovery and at trial that direct inquiry into petitioners' motivation was impermissible under *Palmer* v. *Thompson*, 403 U.S. 217 (1971), noted that "motives are irrelevant if the effect is illegal." 373 F. Supp. 208, 210. The Court of Appeals adopted a similar view, assessing the discriminatory aspects of petitioners' actions "[r]egardless of the Village Board's motivation." 517 F. 2d 409, 413. Of course, an official's racial motivation may not be equivalent to the "racially discriminatory purpose" reflected in his official act, as that phrase is used in *Washington* v. *Davis*. The lower courts' language, therefore, does not necessarily conflict with *Washington*. *Washington's* discriminatory purpose rationale was not discussed *per se* in their opinions. Nevertheless, the Court of Appeals' requirement that more than disproportionate impact be shown, its assessment of that impact in terms of the totality of relevant facts, and its review of petitioners' claimed justifications, taken together, indicate that its approach and result are consistent with *Washington*.

lished that performance on their Test 21 was related to performance in their training program, neither of Arlington Heights' belatedly conceived zoning rationales for the rejection of Lincoln Green can be said to advance any legitimate municipal purpose. Petitioners utterly disregard the established record of their own discriminatory behavior when they ask this court to extend *Washington* v. *Davis* to sanction their rejection of Lincoln Green, an extention that would render the constitutional guarantee against official racial segregation all but useless except in the most blatant, unsophisticated cases of discrimination.

Whether or not the Court of Appeals might properly have buttressed its determination that petitioners violated the Equal Protection Clause with the evidence of their illicit motivation, its opinion clearly reflects the belief that their discrimination was purposeful. Its analysis of the history and context of Arlington Heights' rejection of Lincoln Green and of the claimed justifications for that decision convinced the court below that petitioners' action would perpetuate the massive residential segregation that Arlington Heights' land use policies had fostered. The opinion's comment that "[w]e have no doubt that if Lincoln Green were built, it, unlike the rest of the Village, would be an integrated community" (517 F.2d 409, 414) reflects the conviction that the exclusion of blacks from Arlington Heights has not been (as it could not have been) the result of racially neutral decisions. And the court's conclusion that Arlington Heights has been "exploiting," not merely ignoring, its segregated housing patterns (*id.*) is a determination of purposeful discrimination.

The record in *Washington* v. *Davis* did not establish purposeful racial discrimination. It does here. Without suggesting that the Court of Appeals anticipated the

Washington opinion, respondents do submit that its decision is based on a proper analysis under *Washington* of all of the relevant facts and that it is correct, because it applies the Equal Protection Clause to prevent official conduct that reflects a racially discriminatory purpose (see *Washington* v. *Davis,* 48 L.Ed.2d 597, 607).

II.

WASHINGTON v. DAVIS: TITLE VIII

Another important element of the *Washington* opinion is its distinction between what may be required to establish an equal protection violation on the one hand and what may be required under a Congressional act prohibiting discrimination on the other. 48 L.Ed.2d 597, 611. While purposeful racial discrimination is necessary to sustain a Constitution-based claim, Congress had provided that discriminatory purpose need not be proved in a proper case to establish a violation of Title VII. *Id.* When employment practices that disproportionately disqualify large numbers of blacks are challenged under Title VII, the *Washington* opinion noted, "it is an insufficient response to demonstrate some rational basis for the challenged practices. . . . However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution. . . ." *Id.,* at 611-612.

Thus *Washington* indicates that the appropriate standard of judicial review in a case alleging official racial discrimination may well be more probing if the claim is based on a specific Congressional prohibition of discrimination than if it is based solely on the Constitution. Since the day their complaint was filed, respondents have consistently

contended that Arlington Heights' rejection of Lincoln Green violated the federal fair housing laws [Title VIII of the Civil Rights Act of 1968, (The Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. § 1982)] as well as the Equal Protection Clause. Although the Court of Appeals did not explicitly consider the statutory challenge, its analysis of the overall racial impact of and the insubstantial rationalizations for petitioners' rejection of Lincoln Green and its conclusion that Arlington Heights' action caused an unjustifiable perpetuation of residential segregation are more than sufficient to establish a violation of Title VIII (see Respondents' Brief 38-49).*

Congress has determined in Title VIII that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States" (42 U.S.C. § 3601). To that end, it has proscribed, in the broadest language possible, all practices—public or private—that make housing unavailable to any person because of race or that interfere with the provision of such nondiscriminatory housing (42 U.S.C. § 3604(a) and § 3617) in an effort to achieve the vital national policy of replacing "the ghettos by truly integrated and balanced living patterns." *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205, 211 (1972). Since Arlington Heights'

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* Indeed, in determining that petitioners' action involved illegal segregation, the court below relied on a number of decisions that were based on the federal fair housing laws (507 F.2d at 413-415). See, *e.g., United States* v. *City of Black Jack, Missouri,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975), where a zoning ordinance that prevented construction of a subsidized, integrated development such as Lincoln Green in an all white area was held to violate Title VIII because of its racially discriminatory effects.

refusal to permit construction of Lincoln Green excludes large numbers of blacks from a highly segregated white area rich in jobs and since the claimed justifications for that refusal are insubstantial at best, petitioners have violated Title VIII regardless of whether the court below found the kind of invidious purpose necessary to an equal protection challenge. *Cf. Washington* v. *Davis,* 48 L.Ed.2d 597, 611.

III.
HILLS v. GAUTREAUX

It is hard to imagine how petitioners could take any solace from this Court's decision in *Hills* v. *Gautreaux,* which held that HUD's violation of the Fifth Amendment and the 1964 Civil Rights Act by helping to create Chicago's racially segregated public housing program permitted a federal court to fashion a remedial order extending beyond Chicago's borders. The facts here show a use of local governmental powers in violation of Federal constitutional and statutory rights to prevent construction of an integrated development. The portions of the *Hills* decision quoted by the petitioners in their supplemental brief speak merely of those municipalities which have not yet so misused their powers and such quotes are irrelevant here.

It was understood in *Hills* that the entire Chicago metropolitan area "is a single relevant locality for low rent housing purposes" (47 L.Ed.2d 792, 800) and that a "city-only" remedy would not succeed in alleviating the effects of HUD's past segregative practices, because it would not result in housing being developed in desegregated neighborhoods. *Id.,* at 800, 803. Nevertheless, HUD raised two objections to metropolitan area relief on the basis of *Milliken* v. *Bradley,* 418 U.S. 717 (1974), both of which were rejected by the Court.

First of all, as Justice Stewart's opinion pointed out "[t]he critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution." 47 L.Ed.2d 792, 803. That is an important factor here as well. Arlington Heights, like HUD, has violated constitutional and statutory prohibitions against racial discrimination. Unlike HUD, however, Arlington Heights' violation creates no special problems with respect to the appropriate remedial order. No affirmative duty of any kind is sought to be imposed on Arlington Heights as a result of its segregative action. All that respondents have ever asked is that petitioners stop their illegal interference with MHDC's private efforts to begin to ease the problems created by the overwhelmingly segregated housing patterns that have been developed in Arlington Heights. A simple injunction, requiring neither planning nor expenditures by petitioners, will suffice.

The *Hills* opinion then went on to demonstrate that a remedial order against HUD affecting its conduct beyond Chicago's boundaries would not impermissibly interfere with suburban authorities that had not been implicated in any unlawful conduct. *Id.,* at 805. This was so, the Court noted, because local governments have a role to play in many federal housing assistance programs, including the important § 8 Lower-Income Housing Assistance program of the 1974 Housing and Community Development Act (42 U.S.C. §§ 1437 *et seq.*), and HUD's efforts to expand low-income housing opportunities outside areas of minority concentration would thus not necessarily have a coercive effect on suburban municipalities. *Id.,* at 805-808.

Incredibly, petitioners read this part of the *Hills* opinion as establishing a kind of "reverse-Supremacy Clause,"

under which local zoning restrictions can be exercised at the discretion of municipal officials to frustrate Congressional acts designed to provide for integrated and balanced living patterns (Title VIII) and to promote greater choice of housing opportunities for assisted persons outside of areas of minority concentration (Housing and Community Development Act of 1974; see 47 L.Ed.2d 792, 806-807). Nothing could be further from the intent of *Hills*. While indicating a concern for the legitimate interests of suburbs not found to have violated any law (a protected status that Arlington Heights cannot claim here), the *Hills* opinion pointed out that the approval of even these municipalities is not required as a condition of § 8's applicability to a locality (*id.*, at 807) and that while municipal interests are to be considered by HUD, they cannot block Congress' goal in § 8 of providing for expanded low-income housing opportunities distributed throughout a metropolitan housing market. *Id.*, at 807-808.

Petitioners not only misconstrue the *Hills* opinion, their position would have the ultimate effect of nullifying *Hills*. If Arlington Heights, which has used its zoning and other land use powers to grow into the most residentially segregated large municipality in the Chicago metropolitan area, can block all private efforts to provide subsidized, integrated housing in the Village on the basis of the insubstantial excuses offered here, then every Chicago suburb would be justified in totally excluding such housing, and neither HUD nor the District Court on remand from *Hills* could even consider a metropolitan area remedy. Nor, for that matter, could HUD use the § 8 program to achieve the Congressional purpose of expanding low-income housing opportunities outside areas of minority concentration in any metropolitan housing market in the country. In order for the national housing policy of balanced, dispersed

federally assisted housing to succeed, local authorities such as petitioners must at least have the obligation to refrain from frustrating private efforts to carry out that policy. *United Farm Workers of Florida Housing Project, Inc.* v. *City of Delray Beach, Florida,* 493 F.2d 799, 811 (5th Cir. 1974).

IV.

EASTLAKE v. FOREST CITY ENTERPRISES, INC.

In *Eastlake,* the Court rejected a commercial developer's challenge on procedural due process grounds to a local charter provision that required a referendum to approve a zoning change. Since Arlington Heights does not use a referendum in establishing its zoning classifications and since it is the substance of what petitioners have done, not the procedures which they used, that is attacked here as violative of respondents' equal protection and fair housing rights, *Eastlake* is not in point.

Indeed, the Court in *Eastlake* specifically distinguished that case from a challenge to the merits of the particular zoning classification involved (49 L.Ed.2d 132, 139), which in a commercial case traditionally presents the due process issue in terms of whether the zoning restriction bears a substantial relation to the public health, safety, or general welfare. *E.g., Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Nectow* v. *Cambridge,* 277 U.S. 183 (1928). Arlington Heights' exclusion of Lincoln Green, of course, raises more important issues than the mere diminution in the market value of MHDC's property although, as a matter of fact, respondents have consistently maintained that Arlington Heights' action cannot be justified even under traditional zoning principles that are appropriate for com-

mercial cases where racial segregation is not involved (see 517 F.2d at 412 and 415; Respondents' Brief 3, 6-12, 33-38).*

Wholly apart from racial considerations, Arlington Heights' prevention of the construction of Lincoln Green on the proposed site would in no way advance the public health, safety, or general welfare. Except for the high school and novitiate, the 80 acre Viatorian property has long been vacant, and most of it will remain open space after Lincoln Green is built. The townhouses are carefully planned to harmonize with the desirable features of the landscape and the neighboring single family homes (517 F.2d at 415; Ps. Ex. 5, 11, 51). The MHDC development would make a net contribution to the finances of Arlington Heights and its schools and would have only a minor impact on traffic in the area (see Respondents' Brief 9). There is an overwhelming need for the kind of housing that Lincoln Green would provide, a need much greater than that for any commercial housing that could be proposed for the site (*id.* 10-12; 517 F.2d at 411).

The other side of the coin is that petitioners' two claimed justifications for rejecting the MHDC proposal are not rationally related to any legitimate municipal interest. First they argue that it is their policy to permit multiple family developments only as "buffers" between single family and commercial or institutional uses. Apart from

* Petitioners' repeated claim that their overall "Zoning Ordinance" (whose importance, if not legality, they would magnify by the constant use of capital letters) is "admittedly" reasonable is, at this late stage of the litigation, particularly galling. No one has ever admitted any such thing. As a matter of fact, the record demonstrates that Arlington Heights' residential zoning scheme classifies vacant land, like the Viatorian property, as single-family merely as a holding device that is changed regularly for private projects, but is available to frustrate developers like MHDC who are not acceptable to Arlington Heights (see, *e.g.*, Ps. Exs. 12, 33, 52).

the fact that petitioners have not consistently applied this policy and that it has limited applicability to the townhouses proposed by MHDC (517 F.2d at 415), Lincoln Green would in fact comply with this policy, since it will be located between the single family homes to the south and east and the novitiate and high school on the Viatorian property to the north and west. Nor does the alleged diminution in neighboring property values justify petitioners' action. To the extent that this claim is based on the neighbors' "reliance" on the 1959 comprehensive plan, it is without substance both because their homes were built *before* the plan was developed and because Arlington Heights has permitted commercial multiple family developments next to every high school except St. Viator's and has made dozens of amendments to its zoning plan for construction of such developments adjacent to single family homes (see Ps. Ex. 12, 33, 52). And to the extent that this claim reflects the neighbors' displeasure in living near an integrated, subsidized development, it is entitled to no weight whatsoever.

In sum, construction of Lincoln Green would advance the general welfare, while Arlington Heights' rejection of the development is not justified by any legitimate governmental interest under the *Euclid* analysis.

Conclusion

Under these recent decisions of this Court, as well as under prior law, the decision of the Court of Appeals is correct, and it should be affirmed.

Respectfully submitted,

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